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No. 2737

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WONG BACK SUE,
Appellant,

vs.

CHARLES T. CONNELL,
as Immigration Inspector in Charge,
Appellee.

BRIEF OF APPELLEE

ALBERT SCHOONOVER,
United States Attorney.

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BRIEF OF APPELLEE.

The statement of the case contained in the brief of appellant is substantially correct. It is true that no return to the petition for a writ of habeas corpus was made, but we do not know of any rule making

it incumbent upon a defendant named in a petition for a writ of habeas corpus to answer the petition. Our understanding is that it is incumbent only upon the defendant named to answer the writ that is served upon him, and in this case, inasmuch as the court denied the writ, there was nothing for the defendant named in the petition, Charles T. Connell, to answer. A glance at the transcript of the record shows that the petitioner had attached to his petition the entire record of all proceedings had in the matter of the deportation of the appellant, and upon which the Assistant Secretary of Labor ordered deportation, and from the record as it appeared before the Honorable Judge Bledsoe, it was apparent that the petition did not state facts sufficient to warrant the granting of the writ.

We will take up the points argued by counsel for appellant in the order in which he has seen fit to argue them.

The first point that counsel argues in his brief is that the petitioner Wong Back Sue was not given a fair hearing by the examining inspector. It is true that the petitioner was examined without counsel immediately upon his arrest under the warrant, but at the close of this examination by the examining inspector (Tr. p. 21) he was afforded an opportunity to secure an attorney and witnesses in his behalf, and a delay granted at his request for that purpose. In this preliminary examination the warrant of arrest was read and explained to the alien (Tr. p. 12) and all of the testimony upon which the warrant of arrest was issued and which was used against the alien

was read to him, and ample opportunity was given the alien to meet all of the testimony adverse to him (Tr. pp. 12-21). Counsel complains that this hearing was unfair, in that the alien was not afforded an opportunity to obtain counsel before he was examined at all. In this connection we desire to call the attention of the Court to Section 22 of t he Immigration Act of 1907 as amended by the Acts of March 26, 1910, and March 4, 1913, which reads in part as follows:

> "He (the Commissioner General of Immigration) shall establish such rules and regulations, prescribe such forms of bonds, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss, and shall have authority to enter into contract for the support and relief of such aliens as may fall into distress or need public aid; all under the direction or with the approval of the Secretary of Labor."

And under the authority of this law, Rule 22, was promulgated by the Bureau of Immigration of the Department of Labor, Subdivision 4, Paragraph b, part of which rule reads as follows:

> "During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be repre-

sented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief. If during the hearing new facts are proved which constitute a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to such facts and reason, and he shall be given an opportunity to show cause why he should not be deported therefor."

The point in the examination of an alien when it is necessary for an inspector to allow the alien to obtain counsel in order that all rights of the alien may be thoroughly protected, is fully discussed in the case of Loh Wah Suey vs. Backus, 225 U. S. 460, quoting from the opinion of the Court, page 469, *et seq:*

"It is further alleged that Li A. Sim was refused the right to be represented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and

> before she had been advised of her right to counsel and before she was given an opportunity of securing bail, and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that under examination before the inspection officer at first she had no counsel. Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel."

In the present case, the hearing was continued twice to afford the alien opportunity to obtain counsel (Tr. pp. 21, 22), a nd at the third hearing the alien waived all right to be represented by counsel and stated that he had no evidence to offer in his behalf (Tr. pp. 23, 24), whereupon findings were rendered and he was ordered deported by the Assistant Secretary of Labor.

Therefore, in view of the law as laid down by the Supreme Court and the condition of this record, we believe that the alien was afforded every possible opportunity to present evidence in his behalf and to be represented by counsel at the proper time. In a

case recently decided by Judge Rose for the District of Maryland, entitled Ex Parte Wong Yee Toon (227 Fed. 247), the Court says:

> "The petitioner denies that he had such a (fair) hearing, because, and only because, when first arrested he was examined by the Inspector before he had counsel or any opportunity to procure counsel. Probably there are few or no verbal tests by which to determine whether the immigration authorities have given an alien a fair hearing, but the real question is, have they honestly and by means which would seem fair to a reasonable man, not trained in law, sought to arrive at the truth in order that they may do justice? If their actions, taken as a whole, show that their inquiry was not a fair and honest effort to obtain such result, their action is not binding on the courts, whether from a technical standpoint their procedure was or was not open to criticism."

Applying this test to the case at bar, we believe that the court will arrive at the conclusion that the defendant had a fair hearing.

Counsel argues that the train inspection card (Tr. p. 50) while a portion of the record on which deportation was ordered, was never at any time identified by the party purporting to sign it. We do not believe that such identification was necessary. The card was read to the alien (Tr. p. 14) and he was given an opportunity to meet the allegations of said card. Furthermore, it appears from the transcript that the card was made out by an immigrant in-

spector and was a part of the files of the Bureau of Immigration. In departmental proceedings, the rule is well established that the inspector is not bound by the technical rules of evidence, and this point is so well settled in this character of proceeding that we do not believe it necessary to take the time of the court in quoting decisions thereon. The card was identified by the examining inspector to the alien and was a part of the record, and while in our opinion it had very little weight, if any at all, in the decision arrived at in this case, nevertheless it was some evidence and as such entitled to a place in the record if the inspector saw fit to introduce it. (Healy vs. Backus, 221 Fed. 358.)

Counsel argues in his brief (page 6) that the photograph identified by petitioner is not with a fair degree of clearness shown to be that of petitioner. A reading of the transcript, page 15, discloses that the examining inspector presented a photograph to the alien, which photograph was idetnified by the alien as a photograph of himself, and which the inspector further identified to the alien as the one to which certain statements of four witnesses were attached and which was attached to the application for the warrant of arrest in this case. On page 36, et seq, of the transcript, appear statements of O. L. Hockenberry, D. L. Crane, Jim Lee and George Henry, who positively identify the photograph identified by Wong Back Sue as a photograph of himself on page 15 of the transcript, as that of a Chinaman they had seen in Mexico within a short time prior to

the arrest of the appellant, and on page 36 of the transcript appears the affidavit of George W. Webb, Inspector in Charge at Calexico, to the effect that the photograph marked "Wong Back Sue" and marked "B" on the front, being the same one identified on page 15 of the transcript, was by him shown to the said four witnesses above named. In view of this situation, we fail to see how counsel can contend that the photograph was not shown positively to be that of Wong Back Sue. The case is not the same as that of Bun Chew, 220 Fed. 387, inasmuch as in that case the identification of the photograph was not complete. However, in passing, we may state that in the Bun Chew case, it being a case originating in the Southern District of California, the photographs were afterwards more exactly identified and the alien ordered deported, whereupon he appealed to this court and his case has been under consideration by this court for a period of about three months.

On page 7 of the brief of counsel for appellant, he argues that if the petitioner was out of the United States and holding, as he did, a certificate of residence in the United States, he had a right to reenter the United States at a designated port, and that Calexico is a port of entry designated by the Secretary of Labor. Counsel overlooks the fact that Wong Back Sue (Tr. p. 12) testified that he is a subject of China, of the Chinese race, and born in China, and by occupation a laborer. Therefore, he is of a special class of aliens, which class (Chinese laborers) is prohibited by Congress from entering the

United States by the laws commonly known as the Chinese Exclusion Laws; and under these laws the Secretary of Labor (formerly the Secretary of ~~the Interior~~ Commerce and Labor) has power to designate the ports at which Chinese persons, not of the prohibited class, may enter the United States and by authority of such law the Secretary has named, in the State of California, two ports, and only two, through which Chinese, not of the restricted class, may enter the United States, to-wit, the ports of San Diego and San Francisco. Rule 1 of the Rules approved January 24, 1914, by the Bureau of Immigration under the Treaty Laws and Rules Governing the Admission of Chinese.

> "No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of San Francisco, Cal.; * * * San Diego, Cal.; * * *" and other ports named.

Rule 13 of the same provides the manner in which a Chinese *laborer* domiciled in the United States, desiring to leave the United States may assure his return by getting what is known as a laborer's return certificate, and said rule states that he may depart from the United States only through one of the ports designated in Rule 1, and that he must re-enter the same port. Therefore, counsel's argument that the Chinese laborer Wong Back Sue had a right to re-enter the United States through the port

of Calexico is futile, and can avail nothing. And it would have been a useless procedure to have put the records of the Bureau of Immigration into evidence to show that the alien had not departed nor re-entered through the port of Calexico, inasmuch as he is prohibited from so doing by law.

Counsel further argues that there is no proof that the alien entered the United States. We submit that this is begging the question, inasmuch as there are four statements in evidence to the effect that the alien was seen in Mexico and if he was in Mexico he could not have gotten back into the United States without crossing the international boundary line. The certificate of residence provided for by the Chinese Exclusion law and which the alien presented, to-wit, Certificate of Residence No. 95243, lost its efficacy when the appellant left the United States without procuring a return certificate, and when he returned to the United States, this instrument was absolutely void, unless he had procured, prior to his departure, a return certificate and had properly re-entered the United States through the port of his departure. Therefore, it was incumbent upon the examining inspector in this case to show only that the defendant had been without the United States, whereupon the burden of proof would rest upon the alien to show that such departure was lawful, and inasmuch as he has denied that he was without the United States, he cannot now be heard to say that it is not shown that his re-entry into the United States was illegal. He has offered no return certificate, and his denial of

his departure from the United States must be taken as proof positive that such departure was without the means afforded by law to effect a legal re-entry. We do not believe that this court will hold that the Government must be put to the almost impossible task of examining all of the records of the Department of Labor on the arrest of every alien, but, on the contrary, we believe that this court will hold that where an alien is arrested, if he has a legal status, it is incumbent upon him at least to notify the immigration inspector of such legal status, so that an examination may be held and it may be determined whether or not he is in reality entitled to remain in the United States.

The last point that counsel makes in his brief and the one that we are constrained to believe is the one in which he places the most confidence, is that if Wong Back Sue shall be ordered deported, he should be ordered deported to the Republic of Mexico, and not to China. The place to which deportation is to be made is governed by Sections 20, 21 and 35 of the Immigration Act of 1907, as amended, Section 35 reading:

> "That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was from foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

Wong Back Sue testifies that he is of the Chinese race, a subject of China, and born in China, came to the United States a good many years ago and had never left the United States since. The evidence produced against him showed that he was temporarily without the United States, laboring, in the Republic of Mexico, but there was no evidence to show that he had acquired a domicile in the Republic of Mexico, and in the absence of such proof and more especially in the absence of even a claim that he had acquired such domicile in the Republic of Mexico, the Secretary of Labor would be unwarranted in deporting him to any other country than that from which he came, to-wit, China.

The case of Frick vs. Lewis, 233 U. S. 91, is absolutely determinative of this point. We have carefully examined the cases cited by counsel upon this point, and we are satisfied that if the court takes the time to read them, that it will see that none of the cases cited by counsel is a parallel case with the one at bar, and that in no case has an alien ever been ordered deported to a country other than the trans-Atlantic or trans-Pacific port from which he came, except when it appears from positive and indisputable proof that he has acquired a domicile in some other country.

Therefore, in view of these facts, we believe that the order of the lower court denying the petition should be affirmed.

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